Orange Blossom Manor, Inc. *and* Unite! Union of Needletrades, Industrial and Textile Employees, AFL–CIO, CLC. Case 12–RC–7995

October 27, 1997

DECISION, DIRECTION, AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

The National Labor Relations Board has considered objections and determinative challenges regarding an election held September 25, 1996, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 26 for and 25 against the Petitioner, with 4 challenged ballots, a sufficient number to affect the outcome.[1]

The Board has reviewed the record in light of the exceptions and briefs and, for the reasons set forth below, has decided to adopt the hearing officer's findings and recommendations only to the extent consistent with this decision.[2]

The Employer excepts to the hearing officer's recommendations to sustain Objection 4 and to overrule the challenges to the ballots of Kathleen and Bernadette Morgan (B. Morgan). We agree with the hearing officer's recommendations that Objection 4 be sustained and the challenge to the ballot of Kathleen Morgan be overruled. Contrary to the hearing officer, however, we find that the challenge to the ballot of B. Morgan should be sustained for the reasons set forth below.[3]

The Employer, Orange Blossom Manor, is an assisted living facility providing care for the elderly. B. Morgan worked there as a full-time certified nurse assistant (CNA) from September 1994 to September 15, 1996.[4] The Employer challenged her ballot on the grounds that she had resigned before the date of the election and was not on a temporary leave of absence.

In early September, B. Morgan approached her immediate supervisor, Director of Nursing Sara Stuteville (hereafter the DON), who was looking for someone to switch from the night to the day shift. When B. Morgan indicated that she might be able to do this, the DON said that when B. Morgan was ready, the DON would make a place for her, even if it meant firing someone else.[5]

In a second conversation taking place several days later, B. Morgan told the DON that she was going to participate in a training program at a nearby hospital, where she would also be working full time. She explained that during the 30-day training period she would not be able to arrive on time for her regular shift, but the DON said that it was no problem. B. Morgan later told the DON that she felt it would be unfair to her coworkers if she were to miss the first

[1] Subsequently, the parties stipulated that Mike Sanchez, a challenged voter, was eligible to vote.

[2] In the absence of exceptions, we adopt, pro forma, the hearing officer's recommendations that the Petitioner's Objections 3 and 5 be overruled, the Employer's objections be overruled in their entirety, and the challenge to the ballot of Francine Joseph be sustained.

[3] Member Higgins agrees that the ballot of Kathleen Morgan should be counted, but does so on the basis of a rationale that is different from that of his colleagues. Member Higgins agrees with former Member Cohen's dissent in *Vanalco, Inc.*, 315 NLRB 618 (1994), that the eligibility of individuals on medical leave should be based on whether there is a reasonable prospect that they will return to work. Member Higgins finds that under either *Red Arrow Freight Lines*, 278 NLRB 965 (1986), or his ''reasonable expectancy'' test, Kathleen Morgan was eligible to vote.

The Employer challenged Kathleen Morgan's ballot on the ground that she was not an employee on the payroll eligibility date, August 18, 1996. The Petitioner contends that she was an employee on sick leave on that date. The record shows that Kathleen Morgan requested and was granted a temporary leave of absence from January 8 until January 30, 1996, because of illness. At the Employer's request, Morgan produced a doctor's note stating that she would be unable to work until the symptoms of her illness were controlled. In early February 1996, the Employer's director of nursing (DON) asked Morgan when she would be returning to work, and Morgan replied that she did not know and had to wait for her doctor's permission to return. At that time, the Employer asked for, and received from Morgan, another doctor's note, which stated that she would not be able to return to work until medically cleared. Sometime later, Morgan informed the DON that the doctor had estimated that it would take up to 6 months for Morgan to recover from her illness. The DON telephoned Morgan 1 to 2 months after receiving the second doctor's note to check on her condition and to ask when she would be returning to work. When Morgan stated that she did not know because she was still sick, the DON's only response was ''okay.'' There is no record evidence of any other communication between Morgan and any other Employer representative between April and August 1996.

Morgan contacted the DON in mid-August 1996 (prior to August 18) to advise her that she had been cleared to return, and Morgan was told that she would be put ''on call'' at that time. The DON, however, told Morgan that she would call her when a permanent position became available and that Morgan would get back her former position at the same location. A couple of weeks later, the DON notified Morgan about the availability of a permanent position, and on September 12, 1996, Morgan met with the DON who insisted that she sign ''new employee'' documents. Later that day, Morgan complained to the Employer's administrator, Morris Hyman, about being brought back as a new employee with the resulting loss of seniority. Morgan returned to work in her former full-time position on September 16, 1996, before the September 25, 1996 election. On the day that she returned to work, Hyman told her that he had taken care of her problems and that she was back in her previous position with her seniority restored.

On these facts, where the Employer inquired several times during Morgan's sick leave about her possible return date, and had been informed that she would be able to return in approximately 6 months, Member Higgins finds that Morgan had a reasonable expectancy of returning to work and therefore remained a unit employee eligible to vote in the election. In particular, Member Higgins notes that the Employer's DON gave all indications to Morgan that she would be returning to work as soon as she received medical clearance from her doctor.

[4] All dates are in 1996 unless otherwise indicated.

[5] All the information regarding these conversations comes from the credited testimony of Bernadette Morgan. The DON did not testify.

2 hours of each shift because those were often the most difficult.

B. Morgan told the DON in a third conversation that, after having thought the matter over some more, she had decided to resign, but that she would be ''available to work'' full time again at Orange Blossom once she completed her training. The DON asked B. Morgan if she would be willing to work weekends at Orange Blossom until the training was completed, but B. Morgan declined, saying that she had never had weekends off before and that now she wanted them to herself.

At the conclusion of this conversation, the DON asked B. Morgan to put her intention in writing, which she did in the following words: ''Effective September 15, 1996 I hereby resign as a full-time employee at Orange Blossom Manor. I will remain on call as a part-time employee.'' The note bears B. Morgan's signature and is dated September 5, 1996.

Shortly after she submitted the note, she was offered the chance to remain on Orange Blossom's health insurance plan at her own cost. She chose instead to get coverage through her new employer.

In October, when her training was finished, B. Morgan tried to reach the DON to discuss the possibility of returning to work for the Employer. The DON, however, had since left Orange Blossom, and Morris Hyman, the manager, was then making all hiring decisions. When B. Morgan spoke with Hyman she was told that no positions were available at that time.

The hearing officer found that B. Morgan had ''actually requested a temporary leave of absence.'' She based this finding on B. Morgan's testimony that she and the DON had a clear understanding that she would return to work after the training period and that when she came back a position would be available for her. The hearing officer concluded that although the word ''resign'' appeared in the note, the note was not intended to sever the employment relation. In so doing, she relied on B. Morgan's testimony that the reason the note only partially expressed the understanding she had with the DON was that she relied on the DON's word and did not think any other measures were necessary.

Contrary to the hearing officer, we find it clear from the record that B. Morgan neither requested nor was granted a leave of absence. Thus, as indicated above, the DON asked B. Morgan to put her intention in writing, and in response to that request B. Morgan wrote that she was resigning from her full-time position and would remain on call as a part-time employee. Further, it is clear based on the parties' stipulation at the hearing that on-call employees are not included in the unit. Nowhere in B. Morgan's testimony is the phrase ''leave of absence'' mentioned as having been used in her discussions with the DON nor was it used in any description of the agreement between B. Morgan and the DON. To the contrary, the sum of B. Morgan's intentions was expressed as an intent to resign from the unit position in which she had been previously employed. She expressed this clearly and unambiguously.[6]

In order to participate in an election, an employee must be employed on the date of the election. *Beverly Manor Nursing Home*, 310 NLRB 538 fn. 3 (1993). We find that B. Morgan voluntarily resigned from her unit job before the date of the election. We therefore reverse the hearing officer's finding on this issue, and conclude that she was ineligible to participate in the election.

DIRECTION

It is directed that the Regional Director for Region 12 shall, within 14 days from the date of this Decision, Direction, and Order, open and count the ballots of Mike Sanchez and Kathleen Morgan and thereafter prepare and serve on the parties a revised tally of ballots. If the revised tally shows the Petitioner has received a majority of the votes cast, the Regional Director shall issue a certification of representative. If the revised tally shows a majority of votes cast against the Petitioner, the election shall be set aside and a rerun election shall be conducted.

ORDER

It is ordered that this proceeding is remanded to the Regional Director for Region 12 for further appropriate action.

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[6] Even considering B. Morgan's statement to the DON that she would be available to work on completion of her training, there was no commitment that she would return to full-time unit employment. In any event, her subsequent written statement clearly stated an intent to resign.